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In The

Supreme Court of the United States

October Term, 1993

MAURICIO GUTIERREZ, FRANCISCO AGUIRRE, SIMON BLANCO, TERESA CALZADA, DOMINGO CORTEZ, DELFINO DE LA GARZA, CONCEPCION GARZA, ALFREDO GONZALES, MARIA CONCEPCION GUILLEN, ELENA HERRERA, ELISEO LERMA, VINCENTE LOPEZ, MARIA MARTINEZ, PEDRO ORTIZ, ANASTACIO RAMIREZ, CAROLINA SALINAS, VIRGINIA AGUIRRE, PAULA CHAVEZ, JOSE GARCIA SOSA, MARIA GUADALUPE GARZA, CANDELARIA HINOJOSA, MARIA ZAPATA, AND OFELIA GAONA,

Petitioners,

vs.

UNITED FOODS, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ELIZABETH A. CRABB
Counsel of Record
TEXAS RURAL LEGAL AID, INC.
259 South Texas Blvd.
Weslaco, Texas 78596
(210) 968-9574

MICHAEL T. KIRKPATRICK
TEXAS RURAL LEGAL AID, INC.
259 South Texas Blvd.
Weslaco, Texas 78596

LAURENCE E. NORTON, II
213-A North Front Street
Harrisburg, Pennsylvania 17101

MARC LINDER
COLLEGE OF LAW, UNIVERSITY OF IOWA
Iowa City, Iowa 52242

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Where individuals seek damages for violations of "uniquely personal" rights, as described in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), are they deprived of standing to sue under § 301 of the LMRA if as an element of their case they must prove the breach of a provision of a collective bargaining agreement that implicates collective rights?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming the district court's grant of summary judgment for respondent, is reported at 11 F.3d 556 and is reprinted as Appendix A, at page A1. (References to the appendices bound with this Petition are styled "A___"). The unreported memorandum decision of the United States District Court for the Southern District of Texas, from which appeal was taken, is reprinted as Appendix B, at A17, and the District Court's Order is reprinted as Appendix C, at A25.

JURISDICTION

The decision of the Court of Appeals was announced on January 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AT ISSUE

Section 301 of the Labor Management Relations Act of 1947 (LMRA), (hereinafter "§ 301") provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

STATEMENT OF THE CASE

This case concerns the scope of an individual union member's standing to sue under § 301 and presents the Court the opportunity to provide guidance on a matter explicitly left unresolved in *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). This guidance is needed because a confusing body of case law has generated a conflict in approaches among the circuits that have addressed the issue, culminating in this decision of the Fifth Circuit that significantly undermines the policies served by § 301.

Petitioners are twenty-five former employees of United Foods, Inc., who were terminated from employment when United Foods sold the facility where petitioners worked. At the time of the plant sale, petitioners' employment was governed by a collective bargaining agreement (CBA) negotiated by petitioners' union. The CBA contained a seniority provision which required that the most senior applicant be afforded preference in hiring and recall from layoff. The CBA also contained a successors and assigns clause[1] which,

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[1] The successors and assigns clause provides:
If the Owner or Company hereunder sells, leases or transfers his business or substantially all thereof, the successors, lessees or transferees shall be bound fully by the terms of this Agreement, and shall be obligated to pay the wages and salaries in effect at the time of the sale, lease or transfer, and shall assume all obligations of this Agreement in the place and stead of the Owner or Company signatory hereto.

petitioners allege, obligated United Foods to require any plant purchaser to assume the terms of the CBA.[2]

United Foods transferred the plant without requiring the purchaser to honor the CBA. Following the transfer, petitioners applied for jobs with the purchaser but were not hired. However, the purchaser did hire other former United Foods employees less senior than petitioners. Petitioners repeatedly sought union action to protect their rights, both before and after the plant sale, but the union refused to act. Petitioners then sued United Foods under § 301,[3] alleging that United Foods breached the CBA and the union breached its duty of fair representation.[4]

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[2] The Court of Appeals expressed no opinion as to whether the successors and assigns clause imposed this obligation on United Foods. Opinion, Appendix A at A4 n.4; *Gutierrez v. United Foods, Inc.*, 11 F.3d 556, 558 n.4 (5th Cir. 1994). United Foods denies any such obligation, but did not move for summary judgment on this ground and no record has been developed on the issue.

[3] In *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962), the Court recognized that individuals may sue their employer under § 301 for breach of a CBA.

[4] The union was not named as a defendant because petitioners settled with the union prior to suing United Foods. Nevertheless, petitioners alleged both a breach of the CBA by United Foods and a breach of the duty of fair representation by the union, because this cause of action requires individuals to prove a breach of the union's duty regardless of whether the union is named as a defendant. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 165 (1983). Thus, individual employee actions under § 301 are typically called "hybrid § 301/fair representation" suits. *Id.* The Court of Appeals expressed no opinion as to whether petitioners' union breached its duty of fair representation. United Foods denied that the union breached its duty, but did not move for summary judgment on this ground and no record has been developed on the issue.

The district court granted summary judgment for respondent after holding that petitioners lacked standing to sue United Foods. Order, Appendix C, A25. The district court relied on *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967), where the court held that although individuals may sue under § 301 for violations of personal rights, individuals lack standing to sue for violations of collective rights. Memorandum Opinion, Appendix B at A21. The district court stated that petitioners are suing to enforce the successors and assigns clause of the CBA and that the clause involves collective rights.[5] App. B at A23-24. The district court concluded that petitioners lack standing to sue United Foods under § 301. App. B at A24.

On appeal, the Fifth Circuit recognized that the sole Supreme Court authority addressing individual employee standing under § 301 is *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), where the Court stated that "§ 301 suits encompass those seeking to vindicate 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge." App. A at A6; *Gutierrez v. United Foods, Inc.*, 11 F.3d 556, 559 (5th Cir. 1994) (quoting *Hines*, 424 U.S. at 562 (citing *Smith*)). The Court of Appeals also noted that while *Hines* recognizes individual standing to vindicate uniquely personal rights and offers four examples of such rights, there was no further development of the *Hines* doctrine in either the Fifth

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[5] The district court based its finding that the successors and assigns clause involved collective rights on *Anderson v. Ideal Basic Industries*, 120 L.R.R.M. (BNA) 2043 (E.D. Tenn. 1985), *aff'd*, 804 F.2d 950 (6th Cir. 1986). App. B at A23.

Circuit or the Supreme Court, and there has been considerable confusion among the circuit courts that have confronted the issue.[6] App. A at A7, A14-16; *Gutierrez*, 11 F.3d at 560, 562. Lacking additional guidance, the Fifth Circuit viewed its task as one of determining "whether the right being asserted by plaintiffs is a uniquely personal right, and therefore amenable to individual enforcement, or a collective right of all union members, and therefore reserved to the union to enforce." App. A at A9; *Gutierrez*, 11 F.3d at 560.

Petitioners argued that they are seeking damages for violations of their seniority rights. Petitioners conceded that they lack standing to enforce the successors and assigns clause to the extent that it guarantees collective rights such as union recognition. Petitioners maintained, however, that the uniquely personal nature of their seniority rights was not altered simply because to enforce their seniority rights, they would have to prove as a

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[6] For example, the Fifth Circuit found that the two-part test developed by the Seventh Circuit in *Schultz v. Owens-Illinois, Inc.*, 560 F.2d 849 (7th Cir. 1977), *cert. denied*, 434 U.S. 1011 and 434 U.S. 1035 (1978), "does nothing to further or clarify the analysis of the issue;" that the Ninth Circuit in *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978) had "articulated no theory of what rights are 'uniquely personal' and merely took its cue from dicta in *Hines*," as did the Eleventh Circuit in *Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371 (11th Cir. 1983); and the Second Circuit in *Santos v. District Council of New York City and Vicinity of United Bhd. of Carpenters & Joiners*, 547 F.2d 197, 199 (2d Cir. 1977) had "confused standing under Article III with standing under section 301." App. A at A14-16; *Gutierrez*, 11 F.3d at 562.

predicate issue that United Foods breached the successors and assigns clause.

The Court of Appeals concluded that petitioners lacked standing because as a prerequisite to proving the violation of their personal seniority rights, petitioners would have to prove the breach of a contract clause that implicates collective rights. App. A at A9-10, A16; *Gutierrez*, 11 F.3d at 560, 563.

REASONS FOR GRANTING THE WRIT

1. The Court should determine the scope of individual standing to sue under § 301 because the issue was left unresolved in *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) and *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), and subsequent decisions of the courts of appeal have yielded a confusing body of case law and a conflict of approaches for determining standing.

In *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), the Court held that § 301 provides subject-matter jurisdiction for the federal courts to decide actions brought by individual employees against their employer for damages caused by the breach of an employer-union contract. *Smith* did not address the circumstances under which an individual employee has standing to bring such suits. *Id.* at 201, n.9. The Court has addressed individual standing to bring § 301 suits only in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976). The *Hines* Court did not define or explain the scope of individual standing, but merely stated that "§ 301 suits encompass those seeking

to vindicate 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge."

In the years since *Smith* and *Hines*, the courts of appeal have grappled with the issue of the scope of individual employee standing under § 301, resulting in a confused and inconsistent series of cases. The following discussion of the principal cases on this issue illustrates the conflicts among these courts, both in approach and results. Granting certiorari in this case would provide the Court an opportunity to resolve the standing issue left open for more than thirty years and to direct the courts towards a consistent principle of § 301 standing.

The Eighth Circuit addressed the issue of individual standing under § 301 prior to *Hines*, in *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967). The *Brown* court relied on *Humphrey v. Moore*, 375 U.S. 335 (1964) and *Smith* to conclude that an individual has standing under § 301 where he is "seeking to enforce a right that is personal to him and vested in him at the time of the suit." *Brown*, 365 F.2d at 657. The Eighth Circuit noted, however, that where "the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole," only the union would have standing to enforce the right. Collective rights, according to *Brown*, are those that involve bargaining with management over broad policy issues and which are reserved solely to the union as exclusive bargaining representative. In *Brown*, individual employees sued their employer for refusing to bargain over the company's plan to relocate its plant after the CBA expired. The court held that plaintiffs lacked standing because a failure to bargain "is a

violation of the collective rights of the entire unit and not of the personal rights of the individual members." *Id.*

The Seventh Circuit discussed the issue of individual § 301 standing at length in *Schultz v. Owens-Illinois, Inc.*, 560 F.2d 849 (7th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). That court approached the issue by finding that rights which are " 'uniquely personal' possess two unifying themes." *Id.* at 854 (citing *Smith*). "First, the employment benefit is mandatory under the collective bargaining agreement if certain circumstances have occurred. Second, a factual predicate which is unique and personal to a particular employee establishes these necessary and sufficient circumstances." *Id.* In *Schultz*, plaintiff union members sought damages for their employer's breach of a contractual obligation to establish an apprenticeship program. The court, relying on *Smith* and *Hines*, held that plaintiffs had standing to maintain the § 301 action because the apprenticeship program was mandatory under the CBA and because plaintiffs had sufficient seniority to qualify for the program. Therefore, the court reasoned, plaintiffs were not seeking to enforce "a right possessed by the bargaining unit as a whole." *Schultz*, 560 F.2d at 855.

The Ninth Circuit addressed individual standing under § 301 in *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 511 (9th Cir. 1978), and cited *Smith* and *Hines* as its authority that "rights which are personal rights of the employees may be enforced by them directly under section 301." *Lerwill*, 582 F.2d at 511. In *Lerwill*, individual employees sought to recover overtime pay required by a CBA. The Ninth Circuit found that plaintiffs had standing

because overtime pay was one of the examples of personal rights listed in *Hines*.

The Tenth Circuit addressed individual standing under § 301 in *Bell v. IML Freight, Inc.*, 589 F.2d 502 (10th Cir. 1979). In *Bell*, individual employees sued after they lost seniority rights when two seniority lists were dovetailed into a single list. The employees claimed that it was a breach of the CBA to allow a joint employer-union committee to make the decision regarding the dovetailing of the lists and thus the committee's decision was invalid. The Tenth Circuit held that plaintiffs had standing under § 301 because they would otherwise be left without a remedy. *Id.* at 505.

In determining § 301 standing, the Second Circuit appears to focus on the rights vindicated by the particular relief sought, as opposed to the rights and obligations encompassed in the contract clause allegedly breached. In *Jensen v. Farrell Lines, Inc.*, 658 F.2d 27 (2d Cir. 1981), the vessels on which plaintiffs worked were transferred to a new owner which negotiated an agreement with plaintiffs' union to assume all obligations under the CBA. After the transfer, the union which represented the workers on the new owner's vessels objected, and the jurisdictional dispute was submitted to arbitration and decided in favor of the new owner's preexisting union. Plaintiffs' union did nothing further, and plaintiffs were fired when they refused to join the new union. They then sued their union and the new owner for declaratory and injunctive relief under § 301. The Second Circuit held that plaintiffs could not sue the new owner for breaching its contractual obligation to the union because only the union "could litigate over the existence of the bargaining

relationship." *Id.* at 29 (citing *Brown*). The court noted that plaintiffs were not suing for the violation of personal rights, because "the issue . . . is not one of wrongful discharge, but one of a union-employer relationship." *Id.* (distinguishing *Lerwill*).

However, the Second Circuit has also held that individuals have standing to enforce an arbitration decision ordering a competing affiliate union to stop interfering with plaintiffs' employment opportunities where such interference violated the labor federation's constitution. *Santos v. District Council of New York City and Vicinity of United Bhd. of Carpenters & Joiners*, 547 F.2d 197 (2d Cir. 1977). The court held that plaintiffs could sue because their own union had wrongly refused to enforce the arbitration award, and this wrongful conduct could not be used by the defendant union as a "shield" protecting it from " 'the natural consequences' of its breach of the relevant agreement." *Id.* at 203-04, (quoting *Hines*). The court, citing *Hines* and *Warth v. Seldin*, 422 U.S. 490, 508, (1975), held that plaintiffs had standing to bring the action because they were seeking to vindicate "uniquely personal" rights – the right to seek employment without interference from the other union – and because they "personally would benefit in a tangible way from the courts' intervention." *Santos*, 547 F.2d at 199-200.

In *Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371 (11th Cir. 1983), the Eleventh Circuit cited *Hines* and *Smith* as authority for allowing individual plaintiffs to maintain a hybrid § 301 action against their employer. The *Diaz* court interpreted both *Smith* and *Hines* as decisions involving subject matter jurisdiction under § 301 and reasoned that "[s]ince the employees' suit is clearly founded upon a

breach of the collective bargaining agreement and involves wages, a matter *Hines* and *Smith* expressly held to be a proper subject of an employees' section 301 suit," plaintiffs could maintain their action. *Diaz*, 709 F.2d at 1374. The *Diaz* court held that standing was established because if plaintiffs prevailed, they would recover the tangible benefit of back pay. *Id.*

The approaches of the circuit courts now range from the broadest possible view of standing under § 301, that it is coextensive with Article III standing, *Santos*, 547 F.2d at 199-200, to the extremely restrictive view of the Fifth Circuit in this case, denying standing even where petitioners seek relief only for monetary losses resulting from violations of their seniority rights. These different approaches to the issue of individual standing under § 301, all of which rely to some degree on *Smith* or *Hines*, demonstrate that it is now appropriate and necessary for the Court to provide guidance on the standing issue and further the congressional policy of having the enforcement of CBAs accomplished under a *uniform* body of law. *See, Smith*, 353 U.S. at 200.

2. The Court should decide whether the restrictions on individual standing imposed by the Fifth Circuit undermine the national labor policies embodied in § 301.

Petitioners brought this action under § 301 to recover damages for violations of their uniquely personal seniority rights. The Fifth Circuit held that petitioners lack standing because to recover for violations of their seniority rights, petitioners must prove that United Foods

failed to comply with the successors and assigns clause of the CBA. This result frustrates the "strong policy favoring judicial enforcement of collective bargaining contracts." *Hines*, 424 U.S. at 562.

The hybrid § 301/fair representation action was developed to afford injured employees a remedy where their employer breached a CBA and their union violated its duty of fair representation, and to prevent employers from being shielded "from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements." *Vaca v. Sipes*, 386 U.S. 171, 186 (1967). The Fifth Circuit's decision in the instant case contravenes the policies recognized in *Vaca* and *Hines*.

First, the Fifth Circuit has left petitioners with no remedy for United Foods' damaging failure to abide by the terms of the CBA. Petitioners had vested individual rights to seniority preference in hiring that should have survived the transfer of the facility. Those seniority rights were lost when United Foods breached the CBA by failing in its obligation under the successors and assigns clause to require the successor to assume the CBA. After petitioners' union violated its duty of fair representation by refusing to take action, petitioners' only means of vindicating their personal rights was to bring a hybrid § 301 action against United Foods.[7] By stripping petitioners of the ability to bring such an action, the Fifth

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[7] Petitioners had a cause of action against their union for violating its duty of fair representation, but the damages available were limited to any additional loss caused by the union's refusal to act. The damages caused by United Foods' breach of the agreement can be charged to United Foods alone. *Vaca*, 386

Circuit has left petitioners remediless, which is the very situation the hybrid § 301 action was designed to prevent. "To leave the employee remediless in such circumstances," according to the *Vaca* Court, would "be a great injustice." *Id.* at 185-86.

Second, the Fifth Circuit's decision allows United Foods to escape the consequences of its breach of the CBA and benefit from its own, and the union's, wrongful conduct. By refusing to require the successor to assume the CBA as a condition of its sale of the plant as required by the successors and assigns clause, United Foods benefitted from the anticipated violations of petitioners' rights, in the form of a higher price received for the facility. In addition to increasing the value of the assets it sold, United Foods benefitted from the concessions exacted from petitioners' union in exchange for the successors and assigns clause. When petitioners were not rehired and the union refused to act on their behalf, United Foods was left holding the benefits of its contract breach because the Fifth Circuit's decision shields United Foods from any liability for the violations of petitioners' personal rights.

If there had been no plant sale and United Foods had laid off its work force and then recalled junior workers in place of petitioners, and the union violated its duty of fair representation in refusing to process petitioners' grievance, petitioners would clearly have standing under § 301. Likewise, had United Foods required the purchaser

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U.S. at 197-98, (liability is to be apportioned between the employer and the union according to the damage caused by the fault of each).

to assume the obligations of the CBA as a condition of the sale, petitioners would have standing to sue the purchaser under § 301 for a breach of their seniority rights if they had not been rehired and the union had wrongly refused to process their grievance.

The fact that the company was sold without United Foods requiring the purchaser to assume the CBA means only that, in addition to proving violations of each petitioner's seniority rights, petitioners must prove a violation of the successors and assigns clause. The fact that the successors and assigns clause implicates collective rights in addition to personal rights does not change the uniquely personal nature of the seniority rights petitioners seek to vindicate. The Fifth Circuit's denial of standing frustrates national labor policy by leaving petitioners without a remedy and by allowing United Foods to benefit from its breach of the CBA.

3. The Court should grant certiorari to review the Fifth Circuit's decision because that court's narrow approach to standing will have broad application, severely curtailing the ability of individual employees to bring hybrid § 301 actions.

Even more threatening to the purposes served by § 301 is the Fifth Circuit's justification for denial of standing in this case. That justification, if taken to its logical conclusion, could eliminate standing in virtually all hybrid § 301/fair representation cases.

In ruling that the right asserted by petitioners was collective and not uniquely personal, the court of appeals

refused to recognize that petitioners suffered their damages when they were not rehired, and they seek only to recover the wages lost when less senior workers were rehired and petitioners were left without work. App. A at A9 n.11; *Gutierrez*, 11 F.3d at 560 n.11. Instead, to determine whether the rights petitioners sought to vindicate were "collective" or "personal", the court of appeals focussed solely on the successors and assigns clause. Ignoring the only relief petitioners sought in this case, the court held that the rights asserted were collective in nature because petitioners' success in establishing a violation of the clause by United Foods "would mean that United Foods was obligated to get [the purchaser] to honor not just plaintiffs' seniority rights but the whole package of benefits and privileges contained in the collective bargaining agreement." App. A at A9-10; *Gutierrez*, 11 F.3d at 560. The court held that since this "whole package" included collective rights, such as union recognition, which only the union may enforce, petitioners lack standing to pursue their claims. *Id.*

The approach to standing taken by the Fifth Circuit in this case would appear to govern any time an employer violates a contract clause requiring or prohibiting something that benefits the union as a whole. Under the Fifth Circuit's restrictive view of standing, an employee has no means to vindicate vested personal rights lost when such a clause is breached and the union wrongly refuses to enforce the clause or process the employee's grievance.[8]

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[8] The Fifth Circuit's rule would, for example, appear to preclude a suit for recovery of individual damages caused by

The Fifth Circuit's analysis also denies individuals standing under § 301 whenever, as a predicate for granting plaintiffs relief, a court must construe a CBA provision that implicates collective rights. This reasoning, when examined, would eliminate individual standing under § 301.

Every hybrid § 301/fair representation case is a suit to enforce a provision of a CBA. In every suit to enforce a CBA, as in every contract action, the plaintiff must allege and prove the existence and enforceability of the contract

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breaches of contract clauses such as the one at issue in *Schultz v. Owens-Illinois, Inc.*, 560 F.2d 849 (7th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978), which required the employer to establish an apprenticeship program. The individual workers had no "uniquely personal" right to establishment of the program. Rather, the contract provision gave the workers a legitimate expectation of training leading to higher wages once they achieved a certain level of seniority. The company's failure to establish a program was a breach of a duty owed to the collective, but caused specific injury in the form of lower wages to the plaintiffs who had the seniority to qualify for the program had it been in place. Under the analysis applied by the Fifth Circuit to petitioners' case, these plaintiffs would have no standing to bring such a suit.

This analysis would also have precluded the plaintiffs in *Aguinaga v. United Food and Commercial Workers Int'l Union*, 993 F.2d 1463 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 880 (1994), from suing to recover back pay lost when the employer conducted a sham plant closing and reopened it as a nonunion plant in breach of contract provisions designed to prohibit such actions. Had the *Aguinaga* plaintiffs brought their case to the Fifth Circuit, they would have been denied the right to proceed, notwithstanding that their union "bartered away [p]laintiffs' means of protecting themselves and left [them] without representation," *id.* at 1470-1471, since the employer's contractual duty ran to the union as a whole.

as a prerequisite to showing the contract breach and obtaining relief. Thus, in every § 301 case, there must be an initial determination of whether the employer must honor all of the collective rights in the contract before granting relief on claims that personal rights were violated. Such a determination implicating collective rights also arises any time the employer raises a defense challenging the validity of the CBA.[9] In this sense, collective rights are always implicated in § 301 suits, though individual plaintiffs may only seek damages to vindicate " 'uniquely personal' rights such as wages, hours, overtime pay, and wrongful discharge." *Hines*, 424 U.S. at 562. The Court has recognized that claims involving individual rights "are to a large degree inevitably intertwined with union interests and grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based." *Smith*, 371 U.S. at 200, *quoted in, Wooddell v. Int'l Bhd. of Elec. Workers*, ___ U.S. ___, 112 S.Ct. 494, 116 L.Ed.2d 419, 429-30 (1991).

Here, petitioners were required to show a violation of the successors and assigns clause in order to hold United Foods liable for the violation of their seniority rights. If the possible effect of the court's determination of this issue on collective rights makes this an action to enforce collective rights and destroys petitioners' standing,

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[9] An employee seeking lost wages caused by his termination in violation of a "just cause" provision in a contract would be denied standing by the Fifth Circuit if the employer took the position that the CBA had not been properly extended and thus was not enforceable, because the worker would have to establish the validity of the extension and enforceability of the agreement – something the Fifth Circuit holds only the union may do.

despite the personal nature of the relief petitioners sought, then there is nothing left to individual standing under § 301. This result so clearly violates the letter and spirit of thirty years of the Court's hybrid § 301 jurisprudence in *Smith, Vaca,* and *Hines* that it demonstrates the need for guidance in restoring a uniform national policy in this area of labor-management law.

CONCLUSION

For these reasons, the Court should grant certiorari.

Respectfully submitted,

ELIZABETH A. CRABB
Counsel of Record
TEXAS RURAL LEGAL AID, INC.
259 South Texas Blvd.
Weslaco, Texas 78596
(210) 968-9574

MICHAEL T. KIRKPATRICK
TEXAS RURAL LEGAL AID, INC.
259 South Texas Blvd.
Weslaco, Texas 78596

LAURENCE E. NORTON, II
213-A North Front Street
Harrisburg, Pennsylvania 17101

MARC LINDER
COLLEGE OF LAW, UNIVERSITY OF IOWA
Iowa City, Iowa 52242

Attorneys for Petitioners

APPENDIX A

MAURICIO GUTIERREZ, FRANCISCO AGUIRRE, SIMON BLANCO, TERESA CALZADA, DOMINGO CORTEZ, DELFINO DE LA GARZA, CONCEPCION GARZA, ALFREDO GONZALES, MARIA CONCEPCION GUILLEN, ELENA HERRERA, ELISEO LERMA, VINCENTE LOPEZ, MARIA MARTINEZ, PEDRO ORTIZ, ANASTACIO RAMIREZ, CAROLINA SALINAS, VIRGINIA AGUIRRE, PAULA CHAVEZ, JOSE GARCIA SOSA, MARIA GUADALUPE GARZA, CANDELARIA HINOJOSA, MARIA ZAPATA, AND OFELIA GAONA, Plaintiffs-Appellants,

V.

UNITED FOODS, INC., Defendant-Appellee.

No. 91-6231.

United States Court of Appeals,
Fifth Circuit.
Jan. 14, 1994.

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiffs-appellants union members sued their former employer, defendant-appellee United Foods, Inc., for allegedly breaching the successors and assigns clause of its collective bargaining agreement with their union,

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* Chief Judge Emeritus John R. Brown sat for oral argument in this case, but died before issuance of the final decision herein. Accordingly, this decision is rendered by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

under which they assert that United Foods was obligated to, but did not, require the purchaser of the business from United Foods to assume the labor agreement as a condition of the sale. The court below awarded summary judgment to United Foods on the ground that the employees lacked standing to bring suit under the Labor-Management Relations Act. We agree with that decision and now affirm.

Facts and Proceedings Below

Plaintiffs in this case are twenty-five Mexican-American laborers who worked for United Foods, Inc., a processor of frozen foods, at its Brownsville Refrigerated Services Division in Brownsville, Texas (the Brownsville facility). Plaintiffs were represented by Local 408 (previously Local 171) of the United Food & Commercial Workers International Union (the Union) and were members of a bargaining unit covering all production and maintenance employees, truck drivers, inspectors, and lead men at the Brownsville facility. United Foods and the Union had negotiated a collective bargaining agreement covering the Brownsville facility, which included a successors and assigns clause that is the focus of this case:

> "If the Owner or Company hereunder sells, leases or transfers his business or substantially all thereof, the successors, lessees or transferees shall be bound fully by the terms of this Agreement, and shall be obligated to pay the wages and salaries in effect at the time of the sale, lease or transfer, and shall assume all obligations of

this Agreement in the place and stead of the Owner or Company signatory hereto."[1]

On November 26, 1985, United Foods announced its plans to sell the Brownsville facility to Refrigeration Engineering Company, the parent corporation of Tex-Mex Cold Storage, Inc. (Tex-Mex), and informed all of its Brownsville employees that their employment with United Foods would be terminated the following month. Upon learning about United Foods' plans, plaintiffs sought to have the Union intervene to protect their rights under the collective bargaining agreement. However, the Union took no action to enforce the agreement.

As promised, the Brownsville facility was transferred to Tex-Mex on December 18, 1985, and plaintiffs were discharged from employment. Plaintiffs applied for jobs with Tex-Mex, but were not hired. However, Tex-Mex did hire other former United Foods employees who were less senior than plaintiffs, in violation of plaintiffs' seniority rights under the collective bargaining agreement.

Plaintiffs renewed their efforts to involve the Union and requested that it seek arbitration with United Foods over the asserted breach of the successors and assigns clause. However, the Union again took no action. Therefore, plaintiffs brought suit against United Foods[2] under

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[1] The collective bargaining agreement, which had been adopted on March 1, 1982, was due to expire on March 1, 1986.

[2] The plaintiffs also filed suit against the Union alleging a breach of the Union's duty of fair representation. That suit was subsequently settled. No suit was filed against Tex-Mex, for a successor corporation has no obligation to assume a collective bargaining agreement. *See NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972).

section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185,[3] alleging that, by failing to require Tex-Mex to assume the collective bargaining agreement, United Foods had breached the successors and assigns clause.[4] United Foods moved for summary

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[3] Section 301(a) of the LMRA provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a).

[4] We express no opinion as to whether this clause in fact created any obligation on the part of United Foods. In *Central States, Southeast & Southwest Areas Pension Fund v. PYA/Monarch of Texas, Inc.*, 851 F.2d 780 (5th Cir.1988), this Court was faced with a successorship clause similar to the one in this case. The clause at issue in *Central States* provided:

> "This agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event of a sale of the operation or any part thereof is sold, leased, transferred or taken over by sale, transfer, lease, assignment or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of the agreement for the life thereof. . . . " *Id.* at 781-82.

Acknowledging that the clause contained "general successorship language," this Court nonetheless held that it did not require the employer to compel assumption of the collective bargaining agreement by the purchaser. *Id.* at 782. Lacking more "explicit" or "specific" language, the Court deemed the successorship clause to be "toothless." *Id.* at 782, 783. *But see Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Owens-Illinois, Inc.*, 758 F.Supp. 962, 971 (D.N.J.), *aff'd without op.*, 941

judgment and the district court in a memorandum opinion granted the motion on the basis of the plaintiffs' lack of standing to bring suit under section 301.[5]

Discussion

I.

It has long been settled that section 301 permits a union to sue an employer with whom it has negotiated a collective bargaining agreement for violations of that agreement. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). In *Smith v. Evening News Ass'n*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962), the Supreme Court held that section 301 also encompasses suits brought by union members seeking "to vindicate individual employee rights arising from a collective bargaining contract." *Id.* at 200, 83 S.Ct. at 270.[6] Yet *Smith* is properly read as establishing the *jurisdiction*

F.2d 1201 (3d Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 877, 116 L.Ed.2d 781 (1992) (upholding an arbitrator's decision that a successorship clause obligated an employer to require a purchaser to assume a labor agreement and noting the tension between this conclusion and *Central States*).

[5] United Foods also argued before the district court that the plaintiffs had failed to exhaust the collective bargaining agreement's grievance procedures or the Union's internal remedies. Granting summary judgment on the standing issue, the district court did not reach these arguments. Nor do we.

[6] *Accord DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 163, 103 S.Ct. 2281, 2290, 76 L.Ed.2d 476 (1983) ("It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement.") (citing *Smith*).

of federal courts over such suits. *Smith* did not address the separate question of the scope of employee *standing* to sue, as the majority acknowledged, *see id.* at 201 n. 9, 83 S.Ct. at 270 n. 9, and a dissent emphasized: "[T]he Court studiously refrain[ed] from saying when, for what kinds of breach, or under what circumstances an individual employee can bring a s 301 action and when he must step aside for the union to prosecute his claim." *Id.* at 204, 83 S.Ct. at 272 (opinion of Black, J.).[7]

The Supreme Court's sole attempt to articulate the standing requirements for suits brought by individuals under section 301 occurred in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976). In *Hines*, the Court sustained an employee's right to sue his employer for wrongful discharge in violation of a collective bargaining agreement. Individual workers have standing under section 301, the *Hines* Court said, when they assert " 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge." *Id.* at 5, 96 S.Ct. at 1055 (citing *Smith*).[8] Since *Hines*, however, the Supreme Court has

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[7] That section 301 imposes analytically distinct jurisdictional and standing requirements was reaffirmed recently in *Wooddell v. Int'l Bhd. of Elec. Workers*, ___ U.S. ___, ___ & n. 4, 112 S.Ct. 494, 498 & n. 4, 116 L.Ed.2d 419 (1991).

[8] Before bringing such a suit against his employer, however, an employee must exhaust any grievance or arbitration procedures contained in the collective bargaining agreement, *see Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965), unless the union has breached its duty of fair representation, *see Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Nevertheless, to sue his employer, an employee must still prove that the union breached its duty of

provided no additional guidance as to the scope of the personal rights which give rise to standing under section 301. Judicial development of the *Hines* doctrine in the Courts of Appeals has been similarly scanty and in this Circuit non-existent.[9]

II.

Thus, to evaluate the standing of plaintiffs in this case, we must decide whether United Foods' alleged breach of the successors and assigns clause violated a uniquely personal right of the plaintiffs. Initially, we consider plaintiffs' suggestion that we should "characterize as personal any right conferred by the collective bargaining agreement that is not reserved exclusively to the union as a matter of law." We decline this invitation. Plaintiffs present no authority on behalf of their novel theory and instead defend it on the ground that it strikes an appropriate balance between the competing labor law interests in, on the one hand, having unions act as the exclusive representatives of employee interests and, on

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fair representation. A union breaches its duty of fair representation by acting in a "discriminatory, dishonest, arbitrary, or perfunctory manner." *DelCostello*, 462 U.S. at 164, 103 S.Ct. at 2290.

[9] The *Hines* decision had been anticipated by this Court's decision in *Woodward Iron Co. v. Ware*, 261 F.2d 138 (5th Cir.1958), in which Judge Wisdom held that two employees "have standing in court to sue their employer for damages for unlawful discharge. This right is personal to them and exists irrespective of the union's suable status and interest in prosecuting employee claims under collective agreements." *Id.* at 141.

the other hand, allowing workers to vindicate their individual rights. Although we might agree that these are the relevant concerns,[10] plaintiffs' theory does not strike a proper balance. The standing of individual employees to bring suit under section 301 is an exception to the general rule that only unions can litigate violations of labor agreements. Plaintiffs, however, have identified only two rights which, under their theory, would be reserved exclusively to unions: the right to bargain collectively with the employer, *see May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 66 S.Ct. 203, 90 L.Ed. 145 (1945), and the right to picket an employer's premises, *see Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975). Thus, under plaintiffs' theory, the exception would all but swallow the rule. This outcome would contradict the Supreme Court's instruction that individual standing be limited to uniquely personal rights.

Setting aside plaintiffs' overbroad theory, we have no trouble concluding that plaintiffs lack standing in this case. As we conceive of it, our task is to determine

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[10] As this Court said in *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167 (5th Cir.1971) (per curiam):

> "While [*Smith*] established that jurisdiction exists in this Court to entertain a suit by an individual employee regarding personal rights under Section 301(a), clarification of standing requirements was left to subsequent cases. The problem is that of 'striking a meaningful balance, consistent with existing labor policy, between individual rights and the continued effectiveness of the collective bargaining process.'" *Id.* at 170 (quoting *Local Union No. 12 v. NLRB*, 368 F.2d 12, 18 (5th Cir.1966)).

whether the right being asserted by plaintiffs is a uniquely personal right, and therefore amenable to individual enforcement, or a collective right of all union members, and therefore reserved to the union to enforce. This line between personal and collective rights is not entirely pellucid. Fortunately, we need not today draw that line with precision for this is not a marginal case.

The "right" which United Foods allegedly violated is that of failing to obtain an agreement by Tex-Mex to assume the collective bargaining agreement and to be bound by its terms.[11] This cannot be fairly described as a personal right, much less a uniquely personal one. The successors and assigns clause was a promise made by United Foods to ensure the perpetuation of the collective bargaining agreement should United Foods sell its operation. As such, it represented an obligation from United Foods to the Union as a collectivity. To be sure, assumption of the collective bargaining agreement by Tex-Mex would have benefited individual workers to varying degrees. However, the *right* at issue – United Foods' duty to honor the successors and assigns clause – is one that ran to *all* United Foods employees in equal measure.

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[11] At oral argument, plaintiffs' counsel mischaracterized the right at issue by arguing that plaintiffs are merely asserting their seniority rights under the collective bargaining agreement. The legal right which United Foods allegedly breached is that of failing to enforce the successors and assigns clause. That United Foods' inaction caused plaintiffs to be passed over in favor of less senior workers is a consequence of the right violation, but not the right violation itself.

The collective nature of the right is also evident in the following respect. Successful assertion of the successors and assigns clause would mean that United Foods was obligated to get Tex-Mex to honor not just plaintiffs' seniority rights but the whole package of benefits and privileges contained in the collective bargaining agreement. Chief among these is the recognition of the Union as the workers' representative. Article I, section one of the Agreement stated that "[t]he Company recognizes the Union as the certified collective bargaining agent for all production and maintenance employees, truck drivers, inspectors and leadmen employed by the Company in Cameron County, Texas. . . . " Therefore, by saying that United Foods was obligated to require Tex-Mex to assume the collective bargaining agreement, plaintiffs necessarily are saying that United Foods was obligated to require Tex-Mex to recognize the Union. Individual union members, however, have no authority to assert a union's right to recognition. A union must do that for itself.

III.

Our conclusion today is supported by *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651 (8th Cir.1966), *cert. denied*, 386 U.S. 957, 87 S.Ct. 1023, 18 L.Ed.2d 105 (1967), in which individual employees sued their employer for refusing to bargain over the company's plan to shut down its plant and relocate it after the collective bargaining agreement had expired. The Eighth Circuit, however, held that the employees lacked standing because the company's "failure to discuss these matters according to the contract is a violation of the collective rights of the entire unit and not of the personal rights of

the individual members." *Id.* at 657. We agree with the principle articulated by the *Brown* Court:

> "[W]henever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the Union as the sole representative of that unit would normally have the standing to enforce the right. Thus the individual would have no standing to compel discussion of broad collective bargaining principles such as the renegotiation of a new contract or the relocation of a plant, even if such discussion were required by the existing collective bargaining agreement." *Id.*[12]

It is plain that the successors and assigns clause was, in the words of the *Brown* court, a "collective right[ ] of the entire unit" or a right "possessed by the bargaining unit as a whole."

Plaintiffs attempt to evade the impact of *Brown* by pointing to that court's broad statement that individuals can "enforce any contractual rights acquired under the agreement and sue for any breach by the Company that occurred during the term of the agreement." *Id.* Plaintiffs conveniently omit, however, the important qualifying language contained in the next sentence: "We believe,

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[12] This same principle was applied in *Jensen v. Farrell Lines, Inc.*, 658 F.2d 27 (2d Cir.1981) (per curiam), in which employees brought suit to enforce a provision of a purchasing agreement which obligated their new employer to recognize the union which had represented them previously. Citing *Brown*, the Second Circuit denied the employees standing on the ground that "only [the union] could litigate over the existence of the bargaining relationship." *Id.* at 29.

however, that for an individual to bring an action under § 301 he must be seeking to enforce a right that is *personal* to him and vested at the time of the suit." *Id.* (emphasis added) (citation omitted). *Brown* simply cannot be read to sanction an employee's standing to sue to enforce a company's alleged breach of a successors and assigns clause.

Also buttressing our decision is *Anderson v. Ideal Basic Industries*, 120 L.R.R.M. 2039, 1985 WL 56750 (E.D.Tenn.1985), *aff'd*, 804 F.2d 950 (6th Cir.1986), a factually analogous case. As here, in *Anderson* individual union members brought suit under section 301 to enforce a successorship clause after their employer had sold its operations to another firm and failed to require the purchaser to accede to the terms of a collective bargaining agreement. One issue in *Anderson* was whether the employees had the requisite standing to enforce the successorship clause. It was held that they did not.

> "The Court further is of the opinion that any obligations created by the successorship clause are obligations to the bargaining unit as a whole and are not obligations to the individual members. . . . Individual union members have no authority to bargain with the Company over the terms of the Agreement. Rather, the Union has the power and responsibility to enforce the successorship clause in bargaining with the Company." *Id.* at 2044 (citations omitted).

Plaintiffs attempt to distinguish *Anderson* on the ground that the successorship clause in that case obligated the company to *bargain* with the union, which plaintiffs concede is a collective right. This is a mistaken reading of *Anderson*. The successorship clause in *Anderson*

did not impose a duty to bargain; it was, in fact, quite similar to the clause at issue in this case.[13] To be sure, *Anderson* did hold that the employees lacked standing to sue their employer for failing to bargain with the union. However, the duty to bargain had nothing to do with the successorship clause. As the *Anderson* court recognized, employers have a duty to bargain with a union over the effects of a plant shut down. *See First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 n. 15, 101 S.Ct. 2573, 2580 n. 15, 69 L.Ed.2d 318 (1981) (cited in *Anderson*, 120 L.R.R.M. at 2043). This duty is derived not from any collective bargaining agreement, however, but from ss 8(d) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. ss 158(d) and 158(a)(5). Thus, *Anderson*'s holding pertaining to standing to enforce the successorship clause was entirely distinct from its holding pertaining to standing to require bargaining.

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[13] The successorship clause in Anderson provided: "This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event of the sale or lease by the Company of any plant or terminal covered by this Agreement, or in the event the Company is taken over by sale, lessee assignments, receivership or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. The Company shall give notice of the existence of this Agreement to any purchaser, lessee, assignee, etc., of this Agreement. Such notice shall be in writing with a copy to the Union not later than the effective date of sale." 120 L.R.R.M. at 2042 n. 2.

IV.

Plaintiffs direct our attention to several circuit court cases which uphold the standing of individual employees to sue under section 301. None of these cases, however, articulates a principle which would support the conclusion that plaintiffs have standing in this case.

In *Schultz v. Owens-Illinois, Inc.*, 560 F.2d 849 (7th Cir.1977), *cert. denied*, 434 U.S. 1011, 98 S.Ct. 723, 54 L.Ed.2d 754 (1978), the Seventh Circuit held that machine manufacturing shop employees had standing to sue their employer for failure to institute an apprenticeship program. In so doing, the *Schultz* court purported to apply a two-part "test" for determining whether an asserted right is uniquely personal. According to the *Schultz* court, a right is uniquely personal if, first, the "employment benefit is mandatory under the collective bargaining agreement," *id.* at 854, and second, if there is a "factual predicate which is unique and personal to a particular employee." *Id.* In our opinion, this "test" does nothing to further or clarify the analysis of the issue before us. The first prong merely asks whether the employee was entitled to some benefit under a collective bargaining agreement. But this does not tell us whether the entitlement is personal or collective. The second prong asks whether that right or interest is unique and personal. That, however, merely restates the question which we are called upon to decide. Thus, from the *Schultz* "test" we can derive no principle which would support standing for plaintiffs. On the other hand, *Schultz* does endorse the principle upon which we base our decision today. Namely, that a uniquely personal right is not "a right possessed by the bargaining unit as a whole." *Id.* at 855;

see also id. at 854 ("These plaintiffs are not seeking to represent the entire work force of 366 employees.").

In *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 511 (9th Cir.1978), the Ninth Circuit held that two technicians had standing to sue to recover overtime pay as provided under a collective bargaining agreement. The *Lerwill* Court, however, articulated no theory of what rights are "uniquely personal" and merely took its cue from dicta in *Hines* that among such rights are agreements relating to "wages, hours, *overtime pay*, and wrongful discharge." *Hines*, 424 U.S. at 562, 96 S.Ct. at 1055 (emphasis added) (quoted in *Lerwill* with identical emphasis, 582 F.2d at 511).

Similarly, in *Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371 (11th Cir.1983) (per curiam), the Eleventh Circuit held that employees could sue to recover the back pay to which they were entitled under a collective bargaining agreement. As in *Lerwill*, *Diaz* reasoned that the case "involves wages, a matter *Hines* and *Smith* expressly held to be a proper subject of an employee's section 301 suit." 709 F.2d at 1374.[14]

Finally, plaintiffs cite *Santos v. Dist. Council of New York City and Vicinity of United Bhd. of Carpenters & Joiners*, 547 F.2d 197, 199-200 (2d Cir.1977), in which the Second

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[14] *Diaz* characterized this as an issue of subject matter jurisdiction rather than personal standing. This confusion is understandable since, as noted above, the Supreme Court's *Smith* opinion was cast in jurisdictional terms and only later did *Hines* address standing under section 301. Standing was also involved in *Diaz*, but the issue was standing under Article III rather than standing under section 301.

Circuit held that union members had standing to seek enforcement of an umpire's resolution of an interunion dispute. Whatever analogical significance this holding may have, we believe that the *Santos* court confused standing under Article III with standing under section 301. *Santos* quoted from *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), an Article III standing case concerning a constitutional challenge to a zoning ordinance. In any event, a more recent decision by the Second Circuit cited with approval *Brown v. Sterling Aluminum Products Corp.*, a case which squarely supports our holding. See *Jensen v. Farrell Lines, Inc.*, 658 F.2d 27, 29 (2d Cir.1981) (discussed *supra* in note 12).

Conclusion

For the reasons stated, we conclude that plaintiffs lack standing to bring suit under section 301 because United Foods' alleged breach of the successors and assigns clause did not violate a uniquely personal right of the plaintiffs. The judgment of the district court is accordingly

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MAURICIO GUTIERREZ, FRANCISCO AGUIRRE, SIMON BLANCO, TERESA CALZADA, DOMINGO CORTEZ, DELFINO DE LA GARZA, RAMON GAONA, CONCEPCION GARZA, ALFREDO GONZALEZ, MARIA CONCEPCION GUILLEN, ELENA HERRERA, ELISEO LERMA, VICENTE LOPEZ, MARIA MARTINEZ, PEDRO ORTIZ, ANASTACIO RAMIREZ, CAROLINA SALINAS, VIRGINIA AGUIRRE, PAULA CHAVEZ, JOSE GARCIA SOSA, MARIA GUADALUPE GARZA, CANDELARIA HINOJOSA, ISABEL ORTIZ, JOSE ROMERO, and MARIA ZAPATA,	)	CIVIL ACTION NUMBER B-86-110
VS.	)	
UNITED FOODS, INC.	)	

MEMORANDUM

Having come on to be considered Defendant United Foods, Inc.'s Motion for Judgment on the Pleadings which the Court considered as a Motion for Summary Judgment the Court issues the following ruling.

Plaintiffs Mauricio Gutierrez, Francisco Aguirre, Simon Banco, Teresa Calzada, Domingo Cortez, Delfino

De La Garza, Ramon Gaona, Concepcion Garza, Alfredo Gonzalez, Maria Concepcion Guillen, Elena Herrera, Eliseo Lerma, Vicente Lopez, Maria Martinez, Pedro Ortiz, Anastacio Ramirez, Carolina Salinas, Virginia Aguirre, Paula Chavez, Jose Garcia Sosa, Maria Guadalupe Garza, Candelaria Hinojosa, Isabel Ortiz, Jose Romero and Maria Zapata (hereinafter "Plaintiffs"), former employees of United Foods, Inc., (hereinafter "United Foods"), brought this action against their former employer under Section 301 of the Labor Management Relations Act [29 U.S.C. § 185(a)]. Plaintiffs seek compensatory damages for breach of the successors and assigns clause in the collective bargaining agreement negotiated between United Foods and Plaintiffs' Union (United Foods and Commercial Workers Union International Union, AFL-CIO Local Union No. 171). United Foods filed a Motion for Judgment on the Pleadings and because matters outside the pleadings were considered, the Court has considered said Motion as a Motion for Summary Judgment.

I. BACKGROUND

United Foods is engaged in the processing and sale of frozen foods. Plaintiffs were employees of United Foods at the Brownsville Refrigerated Services Division (hereinafter "Brownsville Division") in Brownsville, Texas, until December 18, 1985 when United Foods sold the assets of its Brownsville Division to Refrigerator Engineering Corporation, the parent company of Tex-Mex Cold Storage, Inc. (hereinafter "Tex-Mex"). After providing Plaintiffs with notice, United Foods terminated the Plaintiffs' employment and ceased all of its operations in the Brownsville facility. Tex-Mex subsequently staffed the

manufacturing plant with their own employees and commenced operations.

United Foods and the United Food and Commercial Workers International Union, AFL-CIO Local Union No. 171 (hereinafter "Union") executed a collective bargaining agreement on March 1, 1982 which covered Plaintiffs' employment at the Brownsville Division. The agreement was for three years. In 1985, the agreement was renewed automatically for one year because neither party gave notice of cancellation within 60 days of the contract's expiration date, as provided in the agreement.

The thrust of Plaintiffs' Complaint is that United Foods breached the successors and assigns clause of the collective bargaining agreement. Said clause is contained in Article XV, Section 9 of the collective bargaining agreement. That section provides:

> If the owner or company hereunder sells, leases or transfers his business or substantially all thereof, the successors, lessees or transferees shall be bound fully by the terms of this Agreement, and shall be obligated to pay the wages and salaries in effect at the time of the sale, lease or transfer, and shall assume all obligations of this Agreement in the place and stead of the owner or company signatures hereto.

Plaintiffs specifically allege that United Foods violated this clause when it sold the assets of its Brownsville Division without requiring Tex-Mex to assume United Foods' obligations in the collective bargaining agreement. Plaintiffs' Complaint also contains allegations concerning the Union's breach of the fair duty of representation.

However, the Complaint does not name the Union as a party defendant.

United Foods moved for dismissal on three grounds. It argues that Plaintiffs lack standing to sue under Section 301 [29 U.S.C. § 185(a)], that Plaintiffs failed to exhaust the grievance procedure of the collective bargaining agreement before filing suit in federal court, and that Plaintiffs failed to exhaust their internal union remedies. The Court is of the opinion that Plaintiffs lack the standing to sue United Foods under Section 301 [29 U.S.C. § 185(a)]. Therefore, the remaining grounds for dismissal need not be addressed.

II. DISCUSSION

Section 301 of the Labor Management Relations Act (hereinafter Section 301), 29 U.S.C. § 185(a), provides in part:

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

It is clear that Section 301 allows a union to sue the employer for violations of the collective bargaining agreement negotiated between the union and the employer. *See Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, (1957).

In some instances, Section 301 also allows individual employees to sue their employer for breach of the collective bargaining agreement. *See Smith v. Evening News Assn.*, 371 U.S. 195, (1962). However, an individual's right to sue his or her employer under section 301 is limited. For example, in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, (1965), the Supreme Court held that individual employees must attempt to use contract grievance procedures in the collective bargaining agreement before bringing suit under Section 301.

Brown v. Sterling Aluminum Products Corp., 365 F.2d 651, (8th Cir. 1966), *cert denied* 386 U.S. 957 (1967) represents a further restriction on the rights of an individual employee to sue the employer under Section 301. In *Brown*, individual union members sued their employer for breach of the collective bargaining agreement when the company closed plant operations in order to relocate and failed to negotiate this decision with the plaintiffs. Specifically, the plaintiffs argued that their prospective loss of employment through the relocation of the plant gave rise to a grievance on which they unsuccessfully sought to bargain with the company under the collective bargaining agreement.

The Court in *Brown* ruled that individual union members lacked standing because the company's failure to discuss the relocation of the plant was a "violation of the collective rights of the entire unit and not of the personal rights of individual members." *Id.* at p. 657. The Court stated:

> Thus, the individual would have no standing to compel discussion of broad collective bargaining principles such as the renegotiation of a new

> contract or the relocation of a plant, even if such discussion were required by the existing collective bargaining agreement. . . . It is the Union alone that has the right to bargain with management on these broad policy issues. *Id.* (citation omitted.)

The Eighth Circuit further stated that "for an individual to bring an action under Section 301 he must be seeking to enforce a right that is personal to him and vested in him at the time of the suit." *Id.* at 657.

Anderson v. Ideal Basic Industries, 120 L.R.R.M. 2043 (E.D. Tenn. 1985), aff'd, 804 F.2d 950 (6th Cir. 1986), directly addresses the issue raised in the present case. The issue in that case was whether individual union members could enforce the successors and assigns clause of a collective bargaining agreement against their employer under Section 301. The plaintiffs sued their employer to collect termination benefits and to enforce the successors and assigns clause of the bargaining agreement between the employer, Ideal Basic Industries and the union. The dispute arose when the employer sold one of its cement plants to another company. Although the employer and the union reached a close-out agreement before the sale, plaintiffs claimed that the close-out agreement did not cancel their rights to termination benefits or enforcement of the successors and assigns clause.

Following the rationale of *Brown*, the court in *Anderson*, held that the plaintiffs lacked the standing to sue the employer for breach of the successors and assigns clause. The court in *Anderson*, specifically stated that:

> Any obligations created by the successorship clause are obligations to the bargaining unit as a

> whole and are not obligations to the individual members. . . . Individual union members have no authority to bargain with the company over the terms of the Agreement. Rather, the Union has the power and responsibility to enforce the successorship clause in bargaining with the company. *Anderson, supra,* 120 L.R.R.M. at 2044.

The court also stated that plaintiffs' proper claim would be against the Union for breach of the duty of fair representation. *Id.*

The present case is substantially similar to the facts in *Anderson*. Here, as in *Anderson* , the collective bargaining agreement contains a successor and assigns clause that obligates the successor to the terms found in the agreement. In both cases, the individual union members were terminated as a result of the sale of plant operations. Further, as in *Anderson,* the present individual union members are suing their employer under Section 301 to enforce the successors and assigns clause to the collective bargaining agreement. In both cases, the Union never sought to enforce the successors and assigns clause.

Plaintiffs argue that the alleged breach of the duty of fair representation provides them with standing to sue United Foods under section 301. Plaintiffs cite *Vaca v. Sipes,* 386 U.S. 171 (1966) for the proposition that individual union members may sue their employer under section 301 on any right, whether personal or collective, simply because the union breached its duty of fair representation. *Vaca* does not support this position. Quite simply, *Vaca* represents the ability of an employee to enforce rights uniquely personal to the individual, such as a

wrongful discharge, and not collective rights such as the enforcement of a successor and assigns clause.

In *Vaca,* Plaintiff sued his employer for wrongful discharge and the union for breach of the duty of fair representation. Plaintiff was permanently discharged for poor health and the union decided not to take his grievance to arbitration because of insufficient evidence. The Supreme Court held that wrongfully discharged employees may bring an action against an employer "provided the employer can prove that the union as bargaining agent breached its duty of fair representation in its handling of *the employee's grievance." Vaca, supra,* 386 U.S. at 186. (Emphasis added.) The rights involved in the present case are not the type which cases have recognized as personal but as previously stated are rights to the Union as a whole.

Based on the foregoing analysis the Court is of the opinion that Defendant's Motion For Summary Judgment should be granted for the reason that Plaintiffs lack standing to sue United Foods for breach of the successors and assigns clause in the collective bargaining agreement.

The Clerk shall send a copy of this Memorandum to counsel for the parties.

DONE on this 14th day of October, 1991, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MAURICIO GUTIERREZ, FRANCISCO AGUIRRE, SIMON BLANCO, TERESA CALZADA, DOMINGO CORTEZ, DELFINO DE LA GARZA, RAMON GAONA, CONCEPCION GARZA, ALFREDO GONZALEZ, MARIA CONCEPCION GUILLEN, ELENA HERRERA, ELISEO LERMA, VICENTE LOPEZ, MARIA MARTINEZ, PEDRO ORTIZ, ANASTACIO RAMIREZ, CAROLINA SALINAS, VIRGINIA AGUIRRE, PAULA CHAVEZ, JOSE GARCIA SOSA, MARIA GUADALUPE GARZA, CANDELARIA HINOJOSA, ISABEL ORTIZ, JOSE ROMERO, and MARIA ZAPATA,	)	CIVIL ACTION NUMBER B-86-110
VS.	)	
UNITED FOODS, INC.	)	

ORDER OF DISMISSAL

In accordance with the Memorandum of even date and for the reasons stated therein Defendant United Foods, Inc.'s Motion For Summary Judgment is hereby GRANTED and the above-referenced case is hereby DISMISSED with costs taxed against Plaintiffs.

The Clerk shall send a copy of this Order of Dismissal to counsel for the parties.

DONE on this 14th day of October, 1991, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES
DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
MAY 12 1994
OFFICE OF THE CLERK

No. 93-1622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MAURICIO GUTIERREZ, FRANCISCO AGUIRRE, SIMON BLANCO, TERESA CALZADA, DOMINGO CORTEZ, DELFINO DE LA GARZA, CONCEPCION GARZA, ALFREDO GONZALES, MARIA CONCEPCION GUILLEN, ELENA HERRERA, ELISEO LERMA, VINCENTE LOPEZ, MARIA MARTINEZ, PEDRO ORTIZ, ANASTACIO RAMIREZ, CAROLINA SALINAS, VIRGINIA AGUIRRE, PAULA CHAVEZ, JOSE GARCIA SOSA, MARIA GUADALUPE GARZA, CANDELARIA HINOJOSA, MARIA ZAPATA, and OFELIA GAONA,

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS C. WALSH
(Counsel of Record)
ERWIN O. SWITZER, III
One Metropolitan Square,
Suite 3600
St. Louis, Missouri 63102-2750
(314) 259-2000

Attorneys for Respondent United Foods, Inc.

BRYAN CAVE
Of Counsel

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

19 pp

QUESTION PRESENTED

Where members of a collective bargaining unit allege that an employer violated a collective bargaining agreement by not requiring another party to assume the entire collective bargaining agreement, are the union members asserting a "uniquely personal right," thus entitling them individually to sue the employer under §301 of the Labor Management Relations Act?

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Labor Management Relations Act §301, 29 U.S.C. §185(a) ..... *passim*

No. 93-1622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MAURICIO GUTIERREZ, FRANCISCO AGUIRRE, SIMON BLANCO, TERESA CALZADA, DOMINGO CORTEZ, DELFINO DE LA GARZA, CONCEPCION GARZA, ALFREDO GONZALES, MARIA CONCEPCION GUILLEN, ELENA HERRERA, ELISEO LERMA, VINCENTE LOPEZ, MARIA MARTINEZ, PEDRO ORTIZ, ANASTACIO RAMIREZ, CAROLINA SALINAS, VIRGINIA AGUIRRE, PAULA CHAVEZ, JOSE GARCIA SOSA, MARIA GUADALUPE GARZA, CANDELARIA HINOJOSA, MARIA ZAPATA, and OFELIA GAONA,

Petitioners,

v.

UNITED FOODS, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners have misdescribed the issue framed by this case in order to enhance its candidacy for certiorari. In the process, they have redrafted the claim presented in their complaint to the district court and in their briefs to the Fifth Circuit so extensively

that the Question Presented, as set forth in their Petition, was not in fact presented below.

Petitioners filed this action in the Southern District of Texas in 1986 against Respondent United Foods, Inc., their former employer.[1] They alleged that they were members of a union which had a collective bargaining agreement ("CBA") with respondent containing a "successors and assigns" clause that provided:

> "If the Owner or Company hereunder sells . . . his business . . ., the successors. . . shall be bound fully by the terms of this Agreement in the place and stead of the Owner or Company signatory hereto" (First Amended Complaint ¶8; R. 555).

Petitioners further pleaded that respondent, in December 1985, sold its Brownsville, Texas, facility (where they were employed) to a company known as Tex-Mex Cold Storage, Inc. ("Tex-Mex"), and they charged respondent with breaching the successors and assigns clause of the CBA

> ". . . by failing to include in its sales contract with Tex-Mex Cold Storage, Inc. a provision pursuant to which the latter assumed all the obligations of the collective bargaining agreement" (*Id.* ¶10; R. 556).

The trial court sustained respondent's motion for summary judgment, holding that the successors and assigns clause created collective rights, rather than the "uniquely personal rights" that this Court has required as a condition to the standing of individual union members to sue the employer for breach of contract under §301 (Pet. Apdx. A23-24). The Fifth Circuit affirmed, while criticizing petitioners' counsel for "mischaracterizing the right at issue" in oral argument (Pet. Apdx. A9, n.11). Petition-

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[1] Respondent is a corporation with no parents and no subsidiaries.

ers, undaunted, have persisted in this Court in their mischaracterization of the right at issue and of their pleaded assertions. As a result, the Question Presented, as stated in their Petition, begs the real question and is not in fact presented at all by this case.

Furthermore, it is undisputed that petitioners did not exhaust the grievance steps set forth in the CBA, which culminate in arbitration. In fact, it is admitted that the first step in the grievance procedure was never initiated. Even though this was ostensibly a suit for breach of the duty of fair representation, the union was not joined as a defendant because petitioners had settled with the union, and the complaint contained no allegations that the union had acted in an arbitrary, discriminatory or bad faith manner.

REASONS WHY THE WRIT SHOULD BE DENIED

Introduction and Summary

The issue actually presented by the record in this case is a simple one: Is an alleged "right" to have an employer force a successor employer to assume a collective bargaining agreement a "uniquely personal right" to individual union members? This question is dispositive because the parties agree that petitioners do *not* have standing to sue under §301 unless their claim is for violation of a "uniquely personal right."

The lower courts correctly concluded that the purported right upon which petitioners sued — violation of the successors and assigns clause which allegedly required Tex-Mex to assume the CBA — was not a uniquely personal right. Indeed, if assumption of the entire collective bargaining agreement and the forced recognition of the union as the collective bargaining agent is not a collective right, we are at a loss to identify one.

The law is so clearly against petitioners that, as noted, they have tried to reframe the issue in their Petition. They now say that the rights involved are seniority rights and that the Fifth Circuit agreed with this characterization. Petitioners are fantasizing. The Fifth Circuit noted that petitioners reformulated their position at oral argument and then pointed out the illogic of the revised argument (Pet. Apdx. A9, n.11). The only act or omission of United Foods about which petitioners complained was the failure to force Tex-Mex to adopt the collective bargaining agreement. The fact that the purchaser did not follow the seniority provisions of the collective bargaining agreement is not a violation of those "rights" by respondent. Petitioners' argument that the Fifth Circuit imposed new restrictions on §301 suits and adopted a test inconsistent with cases from other circuits is premised on their mischaracterization of the decision below, coupled with a flawed analysis of those other cases.

Given the clarity of the law, the consistency among the published cases with similar fact patterns, the inappropriateness of petitioners' raising new issues in their Petition, and the existence of at least three alternative grounds for affirming the judgment in favor of respondent, there is nothing about this case that warrants this Court's attention.

I. PETITIONERS HAVE NO STANDING TO MAINTAIN A §301 ACTION BECAUSE THEY ARE NOT ASSERTING A CLAIM FOR UNIQUELY PERSONAL RIGHTS.

A. The "Right" to Force Assumption of a Collective Bargaining Agreement by a New Employer is Not a Uniquely Personal Right.

A union member does not have standing to bring an individual claim for breach of a CBA unless, among other things, a "uniquely personal" right is involved. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976); *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651, 657 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967). The *Hines* Court listed examples of such rights: wages, hours, overtime pay, and wrongful discharge. The rule generally requiring the *union* to redress violations of a CBA flows from the federal policy that "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees." *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975). Petitioners acknowledge that they do not have standing to enforce collective rights (Pet. 5).

The question decided by the Fifth Circuit was whether petitioners had asserted a uniquely personal right allegedly violated by respondent when it did not force Tex-Mex to assume the collective bargaining agreement pursuant to the successors and

assigns clause.[2] In other words, the "right" plaintiffs seek to vindicate is the right of the union to recognition as the collective bargaining agent as a result of respondent's putative obligation to force the purchaser to assume the CBA, and derivatively the right of bargaining unit members as a whole to collective participation in all benefits of that contract as so assumed. It is difficult to conceive of a right more "collective" and less "uniquely personal" than the "right" to force assumption of an agreement which by its own terms is labeled "collective." Assumption of an entire CBA is not remotely similar to the "wages, hours, overtime pay, and wrongful discharge" types of rights delineated in *Hines*. The Fifth Circuit was squarely on target when it said this is not a marginal case (Pet. Apdx. A9).

B. There is No Conflict or Confusion Among the Courts on the Issue Presented Here.

All cases with similar facts have rejected the argument that uniquely personal rights are involved here. The Petition erroneously suggests the lower courts are befuddled and have produced divergent analyses. The cases finding individual standing involved much different facts, and the Fifth Circuit correctly differentiated the authorities relied on by petitioners.

The Court of Appeals' decision followed the holdings of similar cases. For instance, in *Anderson v. Ideal Basic Industries*, 120 L.R.R.M. 2039 (E.D. Tenn. 1985), *aff'd*, 804 F.2d 950 (6th Cir. 1986), union members sued an employer for alleged breach of a successors and assigns provision in a collective bargaining agreement. The court held that any obligations imposed by the successors clause could be enforced only by the union, not by the members. *Id.* at 2043-44.

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[2] For purposes of the standing issue, we assume *arguendo* that the CBA imposed such a requirement upon respondent. But as we demonstrate in Section II.A., *post*, there was no such duty.

The Fifth Circuit also properly relied on *Brown v. Sterling Aluminum Products Corp.*, 365 F.2d 651 (8th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967). As in the instant case, the company in *Brown* ceased operations at a plant. Individual employees sued under §301 for breach of the CBA, but the court ruled that the company could close a plant completely without incurring individual liability to each of its employees. *Id.* at 657.

Similarly, in *Jensen v. Farrell Lines, Inc.*, 658 F.2d 27 (2d Cir. 1981), the Second Circuit held that only the union, and not an employee, could bring a claim for breach of an agreement by a successor employer to assume a collective bargaining agreement. The court, citing *Brown*, held that a claim relating to the existence of a union-employer relationship can only be vindicated by a union and is not a personal right that can be asserted by an employee. *Id.* at 29. *Accord, Russom v. Sears, Roebuck & Company*, 415 F. Supp. 792 (E.D. Mo. 1976), *aff'd*, 558 F.2d 439 (8th Cir.), *cert. denied*, 434 U.S. 955 (1977) (only the union, and not its constituent members, had the right to insist that an employer arbitrate under a labor agreement).

Petitioners' suggestion of a conflict among the circuits is based on a seriously strained misreading of cases on which they rely and which, as the Fifth Circuit noted, are factually distinct. For instance, in *Schultz v. Owens-Illinois, Inc.*, 560 F.2d 849 (7th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978), only 25 of 366 members of the bargaining unit could benefit from the right asserted in that case (participation in an apprenticeship program which required certain qualifications). In contrast, petitioners here seek to assert a right that would apply to all members of the bargaining unit, namely, continued enforcement of the CBA. Contrary to petitioners' statement that *Schultz* is inconsistent with the Fifth Circuit's decision (Pet. 15-16 n.8), the court below, quoting *Schultz*, said: "*Schultz* does endorse the principle upon which we base our decision today. Namely, that a uniquely

personal right is not a 'right possessed by the bargaining unit as a whole'" (Pet. Apdx. A14).

Nor is there inconsistency with *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978). That case simply held that overtime pay is a uniquely personal right, which is wholly in conformity with *Hines*. *Id.* at 511.

Another of petitioners' authorities is not even a §301 case but deals with standing under Article III of the Constitution, rather than §301 standing. In *Santos v. District Council of NewYork City*, 547 F.2d 197 (2d Cir. 1977), members of one union sued another union. The defendant did not dispute whether the rights claimed were "uniquely personal," which was not directly relevant in that case. *Id.* at 200. *Santos* does *not* equate Article III standing with §301 standing, as petitioners wrongly contend.

Petitioners have also misstated the holding of *Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371 (11th Cir. 1983), and they again confuse standing under §301 with Article III standing. The *Diaz* court held that the plaintiffs had Article III standing. *Id.* at 1374, *citing Warth v. Seldin*, 422 U.S. 490, 508 (1975). When the court addressed the §301 question, it applied the "uniquely personal right" rule. *Id.*[3]

Bell v. IML Freight, Inc., 589 F.2d 502 (10th Cir. 1979), did not cite *Hines* or the "uniquely personal right" principle. It involved instead a direct conflict of interest among union members, some of whom would suffer when others benefited from a revised seniority list. The Tenth Circuit merely held that those union members whose seniority was lost by reason of union action could maintain a suit under §301.

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[3] The Eleventh Circuit in *Diaz* characterized the "uniquely personal right" question as a subject matter jurisdiction issue rather than a standing issue.

In summary, the purported "conflict" between the actual ruling of the Fifth Circuit and the other authorities cited by petitioners is wholly illusory.

C. Petitioners Cannot Now Change Their Cause of Action, Create a New Claim, and Call it "Uniquely Personal."

Until the Petition for a Writ of Certiorari, petitioners claimed in their court filings that the alleged wrongful act of United Foods was its failure to force the purchaser of plant assets to assume the CBA.[4] As previously indicated, petitioners tried to change their characterization of their claim at oral argument in the court of appeals. Now they say that they are alleging that *United Foods* violated their seniority rights when *Tex-Mex* failed to apply seniority rules in rehiring the lawfully-terminated employees.

The Fifth Circuit rejected petitioners' eleventh-hour effort to recharacterize their claim because the new description was wrong. This Court should adopt the same approach for both procedural and substantive reasons. Procedurally, this Court should not consider an argument raised for the first time at oral argument in the court of appeals and denied consideration by that court. Petitioners' complaint and briefs described their claim as

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[4] In their brief to the Fifth Circuit, petitioners argued that the court should adopt an unprecedented definition of uniquely personal rights which would include the right to force assumption of the CBA. They maintained that all rights are "uniquely" personal unless the subject matter is reserved exclusively to the union as a matter of law. Petitioners could think of only two such rights (the right to picket and the right to bargain collectively), neither of which applies to violations of a CBA. In light of the fact that every violation of a CBA would thus constitute a violation of a "uniquely" personal right under petitioners' theory, the Fifth Circuit properly rejected petitioners' invitation to let the exception swallow the rule (Pet. Apdx. 7-8).

one for violation of the successors and assigns clause, not the seniority section.

Substantively, it makes no sense to characterize this case as a claim for breach of the seniority provisions of the CBA. The defendant was Respondent United Foods, not the successor employer Tex-Mex. It was not respondent that failed to apply seniority provisions in hiring. The only act or omission of United Foods which could conceivably give rise to a complaint was the failure to force the purchaser to adopt the CBA. Once the sale occurred, United Foods had no more input on seniority issues than it did on union recognition, holidays, grievance procedures, or any of the other matters encompassed by the CBA. Petitioners' new theory thus has a logical, as well as a legal, gap.

D. The Fifth Circuit Did Not Impose New "Restrictions" on §301 Actions.

Petitioners try to make their argument palatable by distorting the Fifth Circuit's holding and then complaining about the "restrictions" of the fictionalized ruling. They suggest that the Fifth Circuit first concluded that petitioners were suing respondent for violating uniquely personal seniority rights, but then held that such rights were "collective" because petitioners first had to prove the existence of a collective bargaining agreement (Pet. 6, 11-12, 14-17).

That is simply not so. The decision of the Fifth Circuit was straightforward and logically unassailable: (1) Petitioners sued respondent for violating the successors and assigns clause by not forcing assumption of the CBA; (2) any right to an assumption of the CBA was not "uniquely personal" to individual union members; and (3) therefore petitioners as individuals did not have standing under §301 (Pet. Apdx. A16).

In light of petitioners' misdescription of the Fifth Circuit's ruling, it is specious for them to maintain that this case "could

eliminate standing in virtually all hybrid §301/fair representation cases" (Pet. 14). The holding below addressed one type of alleged right: A right to forced assumption of a CBA pursuant to a successors and assigns clause. The court did not label seniority rights as either collective or uniquely personal. Its holding was narrow and unexceptionable and did not impose any new limitations on §301 actions.[5]

II. THERE ARE AT LEAST THREE INDEPENDENT BASES FOR UPHOLDING THE JUDGMENT OF THE FIFTH CIRCUIT.

A grant of certiorari in this case would not be to petitioners' benefit because there are three alternate grounds on which the judgment of the Fifth Circuit can be affirmed. Each of these grounds was briefed by respondents in the Fifth Circuit, but that court's disposition of the standing issue made it unnecessary to discuss any of these alternative bases for affirmance.

A. United Foods Did Not Breach the Collective Bargaining Agreement.

A fundamental underpinning of petitioners' case is the proposition that respondent breached the successors and assigns clause by not forcing Tex-Mex to assume the CBA. The clause imposes no such duty on respondent, as the court held in *Central States, Southeast and Southwest Areas Pension Fund v. PYA/Monarch of Texas, Inc.*, 851 F.2d 780, 782-83 (5th Cir. 1988) (in the absence of specific language prohibiting an employer from engaging in a transaction unless the collective bargaining agreement is assumed, an employer is *not* obligated to secure an

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[5] Petitioners also overstate the case by arguing that they would be without a remedy if they are denied standing (Pet. 12-13). A true breach of a CBA can be redressed at the instance of the union, but petitioners let the union off the hook for supposedly failing to protect their collective rights when they entered into a settlement with the union (Pet. 3, n.4).

assumption of the collective bargaining agreement). Hence, a ruling that petitioners had standing to sue would profit them nothing.

B. Petitioners Failed to Exhaust Their Contractual Remedies.

Even when the alleged right an employee seeks to enforce is one which he is entitled to pursue personally, he must first utilize the procedures spelled out in the collective bargaining agreement and in the union constitution. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). Petitioners admitted below that they did not exhaust the CBA grievance procedures (Appellants' Br. 8, 23). Instead, they argued that they were excused from compliance, but this requirement can be dispensed with only in very limited circumstances, which were not present here.

Petitioners had a duty to pursue each step of the grievance procedure but did not do so. They are thus unable to maintain a §301 action, even if they have standing.

C. Individual Employees Cannot Bring a §301 Claim Against an Employer Unless They Allege and Prove that the Union Breached its Duty of Fair Representation, and Petitioners Did Not Make the Requisite Allegations.

Even assuming, *arguendo*, that petitioners have a viable individual claim against respondent, they cannot pursue it because they have not properly alleged or demonstrated a breach by the union of the duty of fair representation. In order to prove a breach of the duty of fair representation — a necessary predicate to a claim against the employer — a plaintiff must demonstrate that the union acted in an arbitrary, discriminatory or bad faith manner. *Air Line Pilots Ass'n, Intn'l v. O'Neill*, 499 U.S. 65 (1991). *See also DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 (1983).

Petitioners did not allege that the union's actions were arbitrary, discriminatory or in bad faith. They merely averred that the union did not process a grievance.[6] Nor did they present any such evidence in connection with the summary judgment motion. The only "evidence" of "arbitrary conduct" was that the union did not do what petitioners wanted. Summary judgment cannot be avoided on this basis. *Air Line Pilots*, 499 U.S. at 78-79. For this additional reason, petitioners' standing is academic.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Thomas C. Walsh
(Counsel of Record)
Erwin O. Switzer, III
One Metropolitan Square, Suite 3600
St. Louis, Missouri 63102-2750
(314) 259-2000

Attorneys for Respondent
United Foods, Inc.

BRYAN CAVE
Of Counsel

May 1994

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[6] The only reference in the Complaint to the duty of fair representation is in the first paragraph, entitled "Preliminary Statement," which states in passing that the union "breached its duty to represent Plaintiffs fairly."